CITIZENS UNITED

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April 17, 1995

Mr. William J. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RE: Notice of Proposed Rule Making, FCC 94-303.

Dear Mr. Caton:

Enclosed please find an original and nine copies of the comments of Citizens United, Inc. and Citizens United Foundation in opposition to the FCC's proposed rules for facilitating minority and female ownership of mass media facilities.

Please see to it that a copy is provided to each Commissioner.

If you have any questions or need additional information, please feel free to contact me at the address and/or telephone number listed below.

Sincerely,

Michael Boos
Staff Counsel

Enclosures

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List ABCDE

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FCC 94-303

In the Matter of	)	
	)	MM Docket Nos. 94-149 and 91-140
Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities	)	
	)	
	)	

COMMENTS OF CITIZENS UNITED
AND CITIZENS UNITED FOUNDATION
IN OPPOSITION TO PROPOSED INITIATIVES
TO FACILITATE MINORITY AND FEMALE OWNERSHIP

Executive Summary

In its Notice of Proposed Rule Making (FCC 94-323), the Federal Communications Commission (FCC) invites comments on whether it should modify its existing mechanisms aimed at facilitating minority ownership of mass media facilities and adopt new initiatives to increase ownership of these facilities by minorities and women. In particular, the FCC is recommending the adoption of a number of race- and gender-based proposals, which it believes will facilitate minority and female ownership of mass media facilities. It is the long-held, but factually unsupported, position of the FCC that greater minority ownership of broadcast facilities will lead to greater diversity in broadcast programming.

Citizens United, Inc. (CU) and Citizens United Foundation (CUF) are strongly opposed to government-sponsored discrimination based on race or gender. Fundamentally, CU and CUF believe that race- and gender-based preference policies violate equal protection. However, even if such policies are not unlawful, CU and CUF believe they nevertheless undermine the important national policy objective of achieving a color- and gender-blind society in the eyes of government.

CU and CUF oppose the minority-preference programs currently in place under the existing FCC policies. CU and CUF also oppose the new race- and gender-based discriminatory policies that the FCC is proposing in its Notice. We urge the FCC to withdraw the proposed rule, and to fundamentally rethink its policies with an eye toward eliminating all officially sponsored forms of race- and gender-based discrimination.

Statement of Interests

Citizens United, Inc. is a nonprofit membership organization, incorporated under the laws of Virginia. CU has approximately 180,000 members from across the United States. CU conducts programs of education, advocacy, and grass-roots activities in favor of traditional American values, including limited government and freedom of enterprise. CU believes that governmental grants or denials of rights on the basis of race or gender seriously undermines fundamental principles of limited government and freedom of enterprise. On February 28, 1995, CU submitted comments with the FCC opposing Viacom International, Inc.'s "Request for Tax Certificate Pursuant to Section 1071 of the Internal Revenue Code."

Citizens United Foundation is a nonprofit, nonpartisan, educational organization, incorporated under the laws of

Virginia, to inform and educate the public on a variety of issues of national importance. The organization accomplishes its purposes through a variety of programs, including research and studies, conferences, public interest litigation, and participation in the public policy making process. CUF recently joined CU in filing comments with the FCC in opposition to the Viacom International's section 1071 tax certificate request. CUF believes that government-sponsored race- and gender-based preferences violate equal protection.

Background

Since at least 1978, the FCC has officially endorsed race-based discrimination when it gave a new interpretation to Section 1071 of the Internal Revenue Code. This section accords generous tax treatment to the seller of certain broadcast facilities if the FCC certifies that the sale is "necessary or appropriate" to further FCC policies.

Section 1071 was enacted in 1943 to protect radio station owners forced to sell their stations due to FCC rules prohibiting ownership of more than one station in the same market. It was designed to apply only to sales forced by the FCC's multiple ownership rules. But in 1978, the FCC announced a new policy, offering tax certificates to owners who voluntarily sell their radio or television stations to a minority individual or a minority-controlled company. Later the policy was expanded to include cable systems and personal communications services. The theory behind the FCC's policy is that greater minority ownership of broadcast and cable facilities will foster greater "diversity" in programming.

In 1990, by a narrow 5-4 margin, the U.S. Supreme Court upheld the constitutionality of the FCC's minority preference policy.[1] The Court concluded that the policy did not violate equal protection, because: (1)it bore the imprimatur of congressional support, and (2) the policy was at least arguably elated to the achievement of the assertedly important governmental interest of fostering broadcast diversity. On the latter point, the high court deferred to the FCC's asserted expertise regarding the determination that there was an empirical nexus between minority ownership and greater program diversity.

A new trend in civil rights jurisprudence, prompted, at least in part, by changes in the Supreme Court's membership, raise serious doubts as to whether the policy could survive a constitutional challenge today. Four of the five justices who joined in the Metro Broadcasting majority have retired. Among their replacements is Justice Clarence Thomas, who, according to U.S. Law Week, "is generally thought of as a critic of racial preferences."[2] But it is unlikely that the high court will have the opportunity to reconsider the constitutionality of the FCC's Section 1071 policy. On

[1] Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

[2] 63 LW 3573 (Jan. 31. 1995).

April 11, 1995, President Clinton signed into law legislation repealing the policy.[3]

Argument

While a number of factors may have contributed to Congress's decision to repeal the FCC's Section 1071 minority preference policy, at least three considerations echo the concerns of CU and CUF. They are: (1) concerns about the policy's constitutionality; (2) a long-line of well documented abuses; and (3) a total failure, on the part of either the FCC or the policy's non-governmental proponents, to offer evidence that the policy is achieving its stated objective of facilitating "diversity" in mass media programming. Each of these concerns are fully applicable to the proposed Rule now under consideration.

1. There are real doubts as to the constitutionality of the FCC's current and proposed race- and gender-based preference policies.

Since the Metro Broadcasting decision was handed down, there has been a dramatic shift in the Supreme Court's judicial philosophy in the area of civil rights. In 1993, for example, the Court allowed a group of white voters from North Carolina to proceed with a lawsuit challenging the constitutionality of the state's congressional voting districts. The white voters allege that the districts were unlawfully drawn to segregate voters according to racial

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[3] See "Clinton Oks Tax Break for Health Insurance," Washington Times, Apr. 12, 1995, at A10.

classification.[4] In 1994, the Court rejected the contentions of black voters that a Georgia county's single commissioner governing board violated provisions of the Voting Rights Act of 1965.[5] In his concurring opinion to that decision, Justice Clarence Thomas challenged the Court to reassess past decisions predicated on racial stereotyping, which is the main factor underlying the justification for racial preferences. Speaking for millions of Americans, Justice Thomas labeled as "repugnant" to the "ideal of a color-blind Constitution," the assumption that members of racial and ethnic groups must all think and act alike.[6] Currently, the Court has under consideration to a constitutional challenge a federal highway program that uses racially-conscience incentives in awarding construction contracts.[7] If the high court strikes down the program, it would further reinforce doubts as to the constitutionality of the FCC's in-place and proposed minority preferences.

But even if Metro Broadcasting remains good law, there remain real doubt as to the constitutionality of the FCC's minority-preference policies. With the legislative repeal of the Section 1071 policy, the first part of the Supreme Court's Metro Broadcasting analysis is no longer an appropriate basis

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[4] Shaw v. Reno, 125 L.Ed 2d 511 (1993).

[5] Holder v. Hall, 114 S.Ct. 2581 (1994).

[6] Id. at 2597-98.

[7] Adarand Constructors, Inc. v. Pena (No. 93-1841).

for continued discrimination on the part of the FCC, since such discrimination no longer enjoys any imprimatur of congressional support.

2. The FCC's minority-preference policies are continually abused.

Public scrutiny of the FCC's minority-preference policies intensified shortly after Viacom International, Inc., announced plans to sell its vast cable systems to a syndicate nominally controlled by black lawyer Frank Washington, who, as a Carter Administration official, helped craft the FCC's minority-preference policy. As part of the Viacom deal, which was unveiled this past January, Viacom sought a Section 1071 tax certificate, which, according to news reports, would have allowed the mostly white-owned company to forego more than $400 million in capital gains taxes.[8]

Mr. Washington has acknowledged, in congressional testimony, that he planned to personally invest only about $2 million into the deal.[9] Press reports, however, put his expected investment as low as $1 million.[10] But even if the higher figure is correct, Mr. Washington's direct investment would have amounted to no more than eight-tenths of one percent of the purchase price. Moreover, the sales contract

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[8] See e.g. "Viacom Deal's Big Tax Break Concerns FCC," Washington Post, Jan. 11, 1995, at D1.

[9] See Transcript of Hearing on the Federal Communications Commission's Tax Certificate Program, U.S. Senate Committee on Finance at 198-99 (March 7, 1995):.

[10] "Viacom to Get Big Tax Break in Cable Deal," Washington Post, Jan. 4, 1995, at A1; "Jim Crow in New Clothes?" Washington Times, Feb. 6, 1995 at A16.

contained a $3 million buy-out option.[11] Thus, depending on the actual amount of his investment, Mr. Washington was guaranteed a profit of one to two million dollars after a holding period of just three years.

Unfortunately, the Viacom deal is far from the only example of recent abuses in the FCC's minority-preference policies.

In 1994, Anil Gajwani, an immigrant from India, became a millionaire thanks to the generosity of the American taxpayers. Through the FCC's minority-preference policy, Mr. Gajwani was able to purchase a two-way paging system at an FCC auction for $8 million, while non-minority bidders were forced to pay up to $19 million for similar licenses.[12]

Also in 1994, Adelphia Communications set up a partnership called "Page Call." Lisa-Gaye Shering was recruited as a partner, under an agreement that requires her to invest absolutely no capital. But by making Ms. Shering a nominal owner of Page Call, Adelphia received a 40% discount in its $53 million bid for several two-way paging licenses. The deal would not have been possible if it were not for FCC policies favoring firms "owned" by women.[13]

In 1985, while serving as a mayor of Charlotte, North Carolina's, Harvey Gantt, who is black, was part of a group

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[11] See RCS Pacific Limited Partnership Agreement, Article 8.

[12] "Checkmate," Forbes, Jan. 16, 1995, at 106.

[13] "Front Woman," Forbes, Jan. 16, 1995, at 106.

that acquired a license for a new television station license. Thanks to the FCC's minority-preference policies, Mr. Gantt's measly $680 investment allowed him to cash in for a $470,000 profit when the license was resold to white investors just a few weeks after its initial purchase.[14]

Jack Kent Cooke, the wealthy white owner of the Washington Redskins football team, has also used the FCC's minority preference policy to build on his wealth. In 1990, he sold cable television systems in several states for $600 million to a syndicate consisting of Falcon Cable TV, one the largest cable system owners in the country, and six minority investors. After a brief holding period, the minority partners, who had invested very little, sold their interests to Falcon at a large profit.[15]

Clarence McKee, a black lawyer who previously worked at the FCC, used the tax certificate policy to form a partnership with the white owner of Gillett Broadcasting. The partnership purchased a Tampa television station for $365 million, but Mr. McKee put only $390 into the deal. Later he sold his interest to his white partner, making a hefty $1 million profit for himself.[16]

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[14]"What's Really Fair," Time, Nov. 19, 1990, at 124; "White Mischief," The New Republic, Dec. 10, 1990, at 9.

[15]"FCC Minority Program Spurs Deals - and Questions," Washington Post, June 3, 1991, at A1.

[16]"FCC Minority Programs Spur Deals - and Questions," Washington Post, June 3, 1991, at A1; "How the Rich Get Richer," Forbes, May 15, 1989, at A38.

J. Bruce Llewellyn, a wealthy black businessman, joined with other wealthy blacks, including O.J. Simpson and Bill Cosby, to buy a Buffalo television station under the FCC tax certificate policy for $65 million. Due largely to the tax breaks, the sellers turned down a non-subsidized $91 million offer from non-minority investors.[17]

Last year, the FCC held an auction for interactive video licenses. Commercial Realty St. Pete, whose chief operating officer is St. Petersburg businessman James C. Hartley, obtained a license for $33 million, by taking advantage of the FCC's 25% discount for female-owned firms. Later, it was disclosed that the female "owner" was Mr. Hartley's wife. Commenting on his wife's role in the business, Mr. Hartley was quoted as saying, "She plays a major role. A lot of women are wives."[18]

As the above cited abuses demonstrate, the reality is that the FCC's in place minority-preference policies amount to little more that welfare for the wealthy.

3. There is no evidence to support the contention that minority ownership advances the FCC's goal of achieving broadcast diversity.

While the FCC cites data showing an increase in minority ownership of broadcast licenses in the early years of its Section 1071 policy, the agency provides no evidence that this increase has resulted in greater broadcast diversity. As

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[17]Id.

[18]"Color TV: Diversity-Mongering at the FCC," The New Republic, Dec. 19, 1994, at 9.

a consequence, there is no data to validate the FCC's contention that facility ownership and program content are positively correlated. Moreover, even if there has been a marked increase in program diversity over the past 17 years, it seems far more plausible that the change would be the result of audience demand for more diverse programs. There is certainly nothing to suggest that any increase in program diversity is the result of the skin color or sex of a particular broadcast facility's owners.

Finally, it needs to be noted that since the mid-1980s, FCC data shows that minority ownership of broadcast facilities has declined slightly from its peak of 3.0 percent to 2.9 percent today.[19] Thus, for at least the past ten years, the FCC's minority preferences have done nothing to broaden minority ownership of mass media facilities. Therefore, even if there is a positive correlation between broadcast ownership and programming diversity, the evidence suggests that the FCC's minority preference policies have outlived their usefulness in promoting minority ownership.

At the bottom line, while it may have been constitutionally permissible to defer to the FCC's alleged expertise in developing its minority-preference program some 17 years ago. With the passage of more than a decade and a half, the time has come for the FCC to provide empirical data to establish whether or not its objectives have been met. The

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[19]See Permanent Extension of Deduction for Health Insurance Costs of Self-Employed Individuals, House Report No. 104-32, 104th Cong., 1st Sess. (1995), at 4.

failure of either the FCC or others to provide such data strongly suggests that the policy has been an unmitigated failure.

CONCLUSIONS

After considering each of the factors listed above, Congress took the wise step of repealing the FCC's Section 1071 minority-preference policy. While the repeal came to late to undo past abuses, the legislation will prevent Viacom from reaping a $400 million taxpayer financed windfall on its cable systems sale. The time has come for the FCC to follow Congress's lead. Citizens United and Citizens United Foundation respectfully submit that the FCC can take a big step in the right direction by: (1) withdrawing the proposed Rule; and (2) fundamentally rethinking its policies with an eye toward eliminating all officially sponsored forms of race- and gender-based discrimination in the agency's policies.

Respectfully submitted,

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